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No. 03-9046

IN THE
Supreme Court of the United States

CHARLES RUSSELL RHINES,
Petitioner,

v.

DOUGLAS WEBER,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

May a federal district court exercise its inherent authority to stay proceedings when faced with a mixed petition for federal habeas corpus relief, when a stay is necessary to permit a prisoner to present unexhausted claims to state court in the first instance and then to return to federal court for federal review of constitutional claims?

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BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit organization with direct national membership of over 10,000 attorneys, in addition to more than 28,000 affiliate members from all 50 states. Founded in 1958, NACDL is the only professional bar association that represents public and private criminal defense lawyers at the national level. The American Bar Association recognizes

[1] This brief is filed with the written consent of both parties. No party or counsel for a party to this case authored this brief in whole or in part, and no person or entity other than *amicus curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief.

NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice, including issues involving federal habeas corpus. NACDL files approximately 35 *amicus curiae* briefs each year on various issues in this Court and other courts. NACDL has filed *amicus curiae* briefs in this Court in many cases involving federal habeas corpus, including cases raising issues similar to the one presented here. *See Pliler v. Ford*, 124 S. Ct. 2441 (2004); *Slack v. McDaniel*, 529 U.S. 473 (2000); *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998).

STATEMENT OF THE CASE

In *Rose v. Lundy*, 455 U.S. 509 (1982), this Court held that a "mixed" habeas petition – that is, a petition raising both exhausted and unexhausted claims – should in most cases be dismissed "without prejudice," allowing the prisoner to exhaust state remedies and then return to federal court with a perfected petition. Fifteen years later, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which includes a one-year statute of limitations for the filing of federal habeas petitions. 28 U.S.C. § 2244(d)(1)(A). This case arises at the intersection of those two rules, when the return to federal court protected by *Rose* is threatened by the AEDPA limitations period. At issue is the solution – a stay of federal proceedings on a mixed petition – employed in every circuit other than the Eighth that has addressed the problem, designed to preserve *Rose* and cases like it and to ensure that AEDPA does not have the unintended effect of turning the exhaustion requirement into a "trap" that forever forecloses federal court review. *Rose*, 455 U.S. at 520.

1. Petitioner Charles Russell Rhines was convicted in state court in South Dakota of first-degree murder and third-degree burglary. On January 29, 1993, he was sentenced to death. Pet. App. 1:1.[2] His conviction and sentence became final when this Court denied certiorari review on December 2, 1996. *See Rhines v. South Dakota*, 519 U.S. 1013 (1996).

Petitioner promptly filed a state habeas corpus petition on December 5, 1996. That petition was denied by the state trial court on October 8, 1998, and the South Dakota Supreme Court denied petitioner's appeal on February 9, 2000. Pet. App. 1:1-2.

2. Petitioner then promptly filed the federal petition for habeas corpus now at issue. Pet. App. 1:2.[3] There is no question but that the petition was timely filed. Indeed, because AEDPA's statute of limitations was tolled while petitioner's state habeas petition was pending, *see Duncan v. Walker*, 533 U.S. 167 (2001), petitioner filed over eleven months before his one-year period had expired.

On July 3, 2002 – more than sixteen months after petitioner's timely filing – the district court held that petitioner had failed to exhaust certain of his claims. Pet. App. 1:10. Because the AEDPA one-year statute of limitations had then run, dismissal of the entire petition would have precluded federal-court review of any of petitioner's claims. *Id.* at 1:8-9. Accordingly, petitioner moved to "hold the petition in abeyance" while he presented his unexhausted claims to the state courts. *Id.* at 1:8.

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[2] Citations to the petitioner's appendix are in the form of [tab:page].

[3] In fact, petitioner signed and mailed his *pro se* petition a mere eight days after his appeal was denied by the South Dakota Supreme Court, on February 17, 2000. *See* Brief of Petitioner, Statement of the Case. The petition was actually filed in the district court five days later, on February 22, 2000. Whether petitioner's alacrity is measured by the mailing date or the filing date, it is clear that there was no delay involved.

Citing the concurring opinion of Justice Stevens in *Duncan*, 533 U.S. at 182-83, and decisions of several courts of appeals, the district court granted petitioner's request and agreed to "stay the petition" while petitioner exhausted his claims in state court. Pet. App. 1:8-9. The district court conditioned the stay, however, on prompt action by petitioner: petitioner was required to commence state court proceedings within 60 days of the district court's order and to return to the district court within 60 days of the completion of state court review. *Id.* at 1:10.

3. The State appealed the grant of a stay. In a brief *per curiam* decision, the Eighth Circuit reversed and vacated the district court stay order. Pet. App. 2:2. The court left open the possibility that, on remand, petitioner might be permitted to delete unexhausted claims from his petition and proceed on the exhausted claims. *Id.* But relying on *Akins v. Kenney*, 341 F.3d 681, 686 (8th Cir. 2003), which in turn relies on *Rose v. Lundy*, 455 U.S. 509 (1989), the court held that the district court was precluded from "staying Rhines's exhausted claims while he seeks state post-conviction relief on other claims that may be unexhausted." Pet. App. 2:2.

SUMMARY OF ARGUMENT

The issue in this case should not be controversial – and it is not in the lower courts. With the sole exception of the court below, every single federal court of appeals to consider the question has allowed for a stay of proceedings on mixed habeas petitions when AEDPA's statute of limitations otherwise would bar the filing of a perfected petition after full exhaustion. In the First, Second, Third, Fifth, Sixth, Seventh, and Ninth Circuits, that procedure has proven to be eminently workable, leaving district courts with ample discretion to prevent dilatory or abusive litigation tactics. There is no reason for this Court to disturb the sensible consensus that has emerged in courts around the country.

The court below erred in concluding that *Rose v. Lundy*, 455 U.S. 509 (1989) precludes a district court from staying proceedings when faced with a mixed petition. A stay of federal proceedings so that state courts may first review a prisoner's claims on the merits is entirely consistent with the comity principles that underlie *Rose* and does nothing to intrude on state prerogatives. Nor is there any indication, textual or otherwise, that AEDPA was intended to foreclose federal review of the claims of prisoners who file timely but mixed petitions by withdrawing from district courts their customary authority to issue stays. Such an outcome would run contrary to this Court's own decisions, which consistently protect the right of prisoners who file mixed petitions to return to federal court after presenting their claims in state proceedings.

Many members of this Court have recognized already that, in a post-AEDPA world, the stay procedures challenged by respondent are the only sensible way to effectuate the dual interests identified in *Rose*: the interest in allowing state courts the first opportunity to review prisoners' claims, and the interest in ensuring that federal habeas review is subsequently available to state prisoners. Virtually unanimously, the lower courts have come to the same conclusion. This Court should confirm that district courts may exercise their inherent authority to issue stays so that the filing of a mixed petition does not foreclose post-exhaustion federal review.

ARGUMENT

I. A STAY PENDING EXHAUSTION EFFECTUATES THE ESTABLISHED RULE THAT THE FILING OF A MIXED PETITION DOES NOT FORECLOSE FEDERAL REVIEW.

A. This Court's Decisions Protect The Right Of A Prisoner Who Files A Mixed Petition To Return To Federal Court After Fully Exhausting His Claims.

1. The requirement that prisoners exhaust state remedies before habeas relief may be granted by a federal court is not jurisdictional. *Granberry v. Greer*, 481 U.S. 129, 131 (1987); *Strickland v. Washington*, 466 U.S. 668, 679 (1984). Rather, though it furthers important comity interests, the exhaustion doctrine creates only a "technical procedural" requirement for a federal habeas petition. *Stewart v. Martinez-Villareal*, 523 U.S. 637, 645 (1998). As a result, this Court consistently has held that the failure to properly exhaust state remedies cannot "bar a prisoner from ever obtaining federal habeas review," *id.*, nor "bar a prisoner from raising non-frivolous claims" when "a federal court [has] yet to review a single constitutional claim," *Slack v. McDaniel*, 529 U.S. 473, 487 (2000). The exhaustion rule is not designed to "trap the unwary *pro se* prisoner." *Rose*, 455 U.S. at 520.

2. In a line of cases beginning with *Rose*, the Court has applied that principle to mixed petitions. In every one of those cases, the Court has held that a prisoner's failure to comply fully with the exhaustion requirement in the first instance does *not* deprive him of an opportunity for federal review of his claims. On the contrary, the Court has insisted on procedures that protect the right of a prisoner who files a mixed petition to return to federal court after fully exhausting state remedies.

At issue in *Rose* was whether a federal court faced with a mixed petition could consider all of the claims, including

those that were unexhausted. 455 U.S. at 519. The Court held that principles of comity forbid a federal district court from deciding claims that have not been presented to the state courts. *Id.* at 515, 519. At the same time, the Court carefully left open two alternate routes to federal court review. First, a prisoner seeking "speedy relief" could "delete the unexhausted claims" and proceed immediately in federal court on a now fully-exhausted petition, *id.* at 520 – but run the risk that a second federal petition raising newly exhausted claims might be dismissed under the "abuse of the writ" doctrine, *id.* at 521 (plurality opinion). Alternatively, a prisoner could ensure that all of his claims eventually would be heard in federal court by forgoing immediate review and opting instead for "total exhaustion." *Id.* at 522. To effectuate that choice, district courts were instructed to dismiss the entire mixed petition so that the prisoner could fully exhaust his state remedies *before returning to federal court* with one, now-perfected, petition. *Id.* at 514, 520. As this Court recently explained, dismissal under *Rose* always "contemplated that the prisoner could return to federal court after the requisite exhaustion." *Slack*, 529 U.S. at 486.

That right of return was safeguarded again in *Martinez-Villareal*. The question there was whether a federal habeas claim dismissed as "premature" and then reasserted when ripe could be barred as "successive" under AEDPA. 523 U.S. at 643. The Court held that there was no bar: "[O]nce the federal claim has been fairly presented to the state courts, the exhaustion requirement is satisfied" and a habeas petitioner may return to federal court. *Id.* at 644. "To hold otherwise," the Court concluded, "would mean that a dismissal of a first habeas petition for technical procedural reasons would bar a prisoner from ever obtaining federal habeas review." *Id.* at 645.

Similarly, in *Slack*, the Court confirmed that dismissal of an initial petition as mixed does not preclude federal review once all claims are exhausted. Rejecting the state's argument

that any subsequent federal petition could be barred as "successive," the Court reaffirmed that prisoners who file mixed petitions may fully exhaust state remedies and then return to federal court for a hearing. 529 U.S. at 486; *id.* at 486-87 (under *Rose*, subsequent federal review may be precluded "only if a prisoner decline[s] to return to state court and decide[s] to proceed with his exhausted claims in federal court"). And under the "total exhaustion" option, claims not pressed in an initial petition nevertheless may be raised in a subsequent federal petition after the state-court exhaustion anticipated by *Rose*. *Id.* at 487.

In sum, this Court has consistently construed governing habeas law to protect the right of a prisoner who files a mixed petition to return to federal court once he has fully exhausted state remedies. As the Court concluded in *Slack*, any other rule "would be contrary to our admonition that the complete exhaustion rule is not to 'trap the unwary *pro se* petitioner.'" *Id.* (quoting *Rose*, 455 U.S. at 520).

B. A Stay Is Necessary To Effectuate The Right To Return To Federal Court.

1. A procedure for staying mixed petitions became necessary after AEDPA was enacted in 1996. When this Court adopted the "total exhaustion" rule in *Rose*, there was no statute of limitations for the filing of federal habeas petitions, and a prisoner seeking to file a second federal petition after fully exhausting state remedies faced no time bar. But AEDPA added to the mix a one-year statute of limitations, which in many cases would convert the procedures endorsed by *Rose* into a complete bar on federal review.

This case is a perfect example. There is no dispute but that Rhines's first habeas petition was filed within – and well within – AEDPA's one-year limitations period. But the district court did not decide that the petition included unexhausted claims until sixteen months later, *after* the AEDPA statute of limitations had expired. *See supra* at 3. As a result, *Rose*'s "total exhaustion" option was foreclosed; if the district court dismissed Rhines's petition to allow for exhaustion of as-yet unexhausted claims, Rhines would be time-barred when he sought to return to federal court with a perfected petition, and *none* of his claims would ever be reviewed in federal court.[4]

There is nothing unique about this case. As Justice Breyer explained in *Duncan v. Walker*, 533 U.S. 167, 186 (2001) (Breyer, J., dissenting), 57 percent of federal habeas petitions are dismissed for failure to completely exhaust state remedies. And on average, district courts take 268 days to dismiss petitions on procedural grounds. *Id.* That means that a prisoner who files a petition *within* the AEDPA limitations period often will have his petition dismissed as mixed only *after* the period has expired – when, absent a stay of federal proceedings, it will be impossible for him to file a subsequent perfected petition in federal court. Moreover, that outcome may have nothing to do with a prisoner's diligence and everything to do with which district court hears his case. "If Prisoner A and Prisoner B file mixed petitions in different district courts six months before the [] limitations period expires, and the court takes three months to dismiss Prisoner A's petition, but seven months to dismiss Prisoner B's petition, Prisoner A will be able to return to federal court after exhausting state remedies, but prisoner B – due to no fault of his own – may not." *Id.*

2. Respondent suggests that a prisoner may avoid foreclosure of federal review by making a "choice" to assert only exhausted claims in an initial petition. Cert. Opp. at 12. That is no answer to the problem. *Rose* and *Slack* protect the

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[4] If there are grounds for equitable tolling of AEDPA's statute of limitations in this case – which there may well be, *see* Pet. for Cert. at 3 – then petitioner would be permitted to file a fully exhausted petition after the limitation period ordinarily would have run. This brief does not address the equitable tolling issue, and proceeds on the assumption that such tolling might not be warranted in this or other cases.

right of prisoners to federal review even after filing *mixed* petitions. And they do so precisely because, as this Court has recognized, the exhaustion rule, straightforward in the abstract, is very difficult to navigate in practice – especially for the vast majority of prisoners who are proceeding *pro se*.[5]

Even the most diligent prisoner, for instance, may have difficulty identifying precisely which state remedies must be exhausted. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999) (applying exhaustion doctrine to requests for discretionary review). A prisoner or even a lawyer may draft inartfully, so that a constitutional claim is not pressed with adequate specificity or "factual commonality." *See* Pet. App. at 1:5 (petitioner "presented the legal substance of his claim to the state court," but failed to "present the same factual argument"). Or a state post-conviction petition may be procedurally deficient in some way – and thus lose the benefit of AEDPA's tolling provision for "properly filed" state pleadings. *See* 28 U.S.C. § 2244(d)(2).

The problem created by the interplay between *Rose*'s "total exhaustion" procedures and the AEDPA limitations period cannot be wished away by imagining a world in which good-faith litigants never "choose" to file mixed petitions. The rule adopted by the court below necessarily entails that some significant number of prisoners, acting with all due diligence, will file timely petitions that include unexhausted claims that can never be reviewed in federal court. The "total exhaustion" rule was not meant to operate as that kind of a "trap" for the "unwary *pro se* petitioner." *Slack*, 529 U.S. at 487.

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[5] Because this is a death case, petitioner was represented by counsel during federal habeas proceedings. *See* 21 U.S.C. § 848(q)(4)(B). But for habeas petitioners generally, that is the exception, not the rule. *See Duncan*, 533 U.S. at 191 (Breyer, J., dissenting) ("vast majority" of habeas petitions are filed *pro se*). This Court's rules must be designed with the *pro se* petitioner in mind.

II. THE STAY ENTERED BY THE DISTRICT COURT WAS WITHIN ITS DISCRETIONARY AUTHORITY.

Fortunately, nothing in AEDPA or this Court's cases requires such a draconian result. As Justice Stevens explained in his concurring opinion in *Duncan*: "[A]lthough the Court's pre-AEDPA decision in *Rose v. Lundy* prescribed the dismissal of federal habeas corpus petitions containing unexhausted claims, in our post-AEDPA world there is no reason why a district court should not retain jurisdiction over a meritorious claim and stay further proceedings pending the complete exhaustion of state remedies." 533 U.S. at 182-83.

That sensible solution has now been adopted by at least seven federal circuits – with the only dissenter the court of appeals below. *See Pliler v. Ford*, 124 S. Ct. 2441, 2448 (2004) (O'Connor, J., concurring). At least four Justices of this Court already have approved stays of federal habeas proceedings pending complete exhaustion, and a fifth has acknowledged the prevalence of the procedure without questioning its validity. *See Duncan*, 533 U.S. at 182 (Souter, J., concurring) ("nothing bars a district court from retaining jurisdiction pending complete exhaustion[]"); *id.* at 182-83 (Stevens, J., concurring) ("no reason" why district court should not "stay further proceedings" pending exhaustion); *id.* at 192 (Breyer & Ginsburg, JJ., dissenting) (referring to Justice Stevens' "sound suggestion" that courts stay mixed petitions pending exhaustion); *Pliler*, 124 S. Ct. at 2449-51 (Breyer, J., dissenting) (defending validity of "stay and abeyance" procedure); *id.* at 2448 (O'Connor, J., concurring) (though "stay and abeyance" procedure not before the Court, "not[ing] that the procedure is not an idiosyncratic one," and has in fact been approved by "seven of the eight Circuits to consider it"). And such stays are entirely consistent with both AEDPA and this Court's decisions.

A. *Rose* Does Not Preclude A Stay Of Federal Habeas Proceedings Pending Complete Exhaustion.

1. District courts have inherent authority to issue stays in proceedings before them. "[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy and effort for itself, for counsel, and for litigants." *Landis v. North American Co.*, 299 U.S. 248, 254 (1936); *see also Arkadelphia Co. v. St. Louis Southwestern Ry. Co.*, 249 U.S. 134, 146 (1919) (power to stay proceedings is "inherent in every court" retaining jurisdiction over an action); *Clinton v. Jones*, 520 U.S. 681, 683 (1997) (district court has "broad discretion to stay proceedings as an incident to control of its own docket").

2. The Eighth Circuit is of the view that the authority of a district court to issue a stay evaporates when a mixed federal habeas petition is at issue, as a result of this Court's decision in *Rose v. Lundy*. *See Akins v. Kenney*, 341 F.3d 681, 686 (8th Cir. 2003). That position is incorrect. *Rose* holds that a federal district court may not *adjudicate* a habeas claim before it has been fairly presented to the state courts. 455 U.S. at 515; *cf.* 28 U.S.C. § 2254(b)(1) (federal habeas petition may not be "granted" prior to exhaustion). It would be an affront to comity and state sovereignty, the Court has explained, for a "federal district court to upset a state court conviction without [affording] an opportunity to the state courts to correct a constitutional violation." *Darr v. Burford*, 339 U.S. 200, 204 (1950). A *stay* of federal habeas proceedings, on the other hand, simply defers federal-court action, *see id.*, while the state courts consider the merits of a prisoner's claims in the first instance. It is entirely consistent with the comity principles on which *Rose* is based, and does nothing to intrude on state prerogatives. *See Pliler*, 124 S. Ct. at 2450 (Breyer, J., dissenting) (stay procedure "recognizes the comity interests that *Rose* identified").[6]

3. That much is virtually common ground among the federal courts of appeals, with only the Eighth Circuit in dissent. *See, e.g.*, *Nowaczyk v. Warden*, 299 F.3d 69 (1st Cir. 2002); *Zarvela v. Artuz*, 254 F.3d 374 (2nd Cir. 2001); *Crews v. Horn*, 360 F.3d 146 (3rd Cir. 2004); *Brewer v. Johnson*, 139 F.3d 491 (5th Cir. 1998); *Palmer v. Carlton*, 276 F.3d 777 (6th Cir. 2002); *Freeman v. Page*, 208 F.3d 572 (7th Cir. 2000); *Calderon v. Taylor*, 134 F.3d 981 (9th Cir. 1998); *see generally Pliler*, 124 S. Ct. at 2448 (O'Connor, J., concurring) (describing circuit-court case law); *id.* at 2450 (Breyer, J., dissenting) (same). At a minimum, this Court should approve the "growing consensus" among the federal courts that a stay of proceedings on a mixed petition is well within a district court's discretion. *See Nowaczyk*, 299 F.3d at 79.

Where there is less consensus is on the precise nature of the stay of proceedings contemplated. On that subsidiary question, there is a difference among the circuit courts, though it is rarely addressed or even acknowledged. At least two federal courts of appeals have authorized district courts to stay mixed petitions in their entirety pending state-court

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[6] It is even clearer – and ought to be beyond dispute – that *Rose* permits a prisoner who files a mixed petition to forgo complete exhaustion, and instead to delete unexhausted claims and proceed immediately on those that are exhausted. The court below remanded so that the district court could consider the issue, noting only that "*Akins* did not decide whether a petitioner may delete unexhausted claims while proceeding only on the claims he believes are fully exhausted." Pet. App. 2:2. Though *Akins* did not decide that question, *Rose* did. *Rose* unambiguously and by terms gives a prisoner who files a mixed petition the "choice of returning to state court to exhaust his claims *or of amending or resubmitting the habeas petition to present only exhausted claims to the district court.*" *Rose*, 455 U.S. at 510 (emphasis added). To the extent there is any real confusion on the point, the Court should take this opportunity to reaffirm that a prisoner may withdraw unexhausted claims from a habeas petition and proceed with exhausted claims before the district court.

review of as-yet unexhausted claims. *See Crews*, 360 F.3d at 154 n.5 (3rd Cir.); *Freeman*, 208 F.3d at 576 (7th Cir.); *see also Duncan*, 533 U.S. at 182-83 (Stevens, J., concurring) (suggesting that entire petition may be stayed); *id.* at 192 (Breyer, J., dissenting) (noting "Justice Stevens' sound suggestions that district courts hold mixed petitions in abeyance"). The district court in this case appears to have done just that, staying "the petition for habeas corpus" pending exhaustion of specified claims. Pet. App. 1:10. But other courts of appeals have endorsed a different procedure, of the sort described by this Court in *Pliler*: "[F]irst, dismissal of any unexhausted claims from the original mixed habeas petition; second, a stay of the remaining claims, pending exhaustion of the dismissed unexhausted claims in state court; and third, amendment of the original petition to add the newly exhausted claims that then relate back to the original petition." 124 S. Ct. at 2445; *see, e.g.*, *Zarvela*, 254 F.3d at 380 (2nd Cir.); *Palmer*, 276 F.3d at 781 (6th Cir.).

As petitioner demonstrates, that procedure – which amounts to a stay of a perfected petition – is fully consistent with *Rose*.[7]

[7] It is not entirely clear that the Eighth Circuit itself has disapproved staying a formerly mixed petition once it has been purged of unexhausted claims. In *Atkins*, the case on which the court of appeals placed exclusive reliance below, the court held only that a district court as a general rule "has no authority to hold a habeas petition *containing unexhausted claims* in abeyance." 341 F.3d at 686 (quoting *Carmichael v. White*, 163 F.3d 1044, 1045 (8th Cir. 1998) (emphasis added). The *per curiam* decision below – without acknowledging any shift – cites *Atkins* for a different proposition: that the district court lacked authority to "stay[] Rhine's exhausted claims while he seeks state post-conviction relief on other claims that may be unexhausted." Pet. App. 2:2. To add to the confusion, the district court appears not, in fact, to have stayed the mixed petition in its entirety – so that the *per curiam* decision's recasting of *Atkins* was unnecessary to its holding. It may well be that the Eight Circuit simply has not considered or addressed the distinction between staying a mixed petition in its entirety and staying a petition once unexhausted claims have been dismissed.

But the better approach is for district courts simply to stay mixed petitions in their entirety. As compared to the tripartite "dismiss, stay, and amend" procedure, a one-step stay has a decided advantage in terms of judicial economy: there is no initial dismissal of unexhausted claims and, because all originally-filed claims are held in abeyance, there is no need for a prisoner to file an amended petition – itself a significant undertaking in many habeas cases - to add subsequently exhausted claims when he returns to federal court As a result, there is also no need for litigation on the ancillary issue of amendment. *See Crews*, 360 F.3d at 154 n.5 (stay of entire petition "will conserve judicial resources by avoiding litigation" over which claims may be added by amendment).

Amicus believes that holding a mixed petition in abeyance is fully consistent with *Rose*'s prohibition on adjudication of unexhausted claims. Whether a stay covers an entire petition or only unexhausted claims makes no difference to the core concerns underlying *Rose*; either way, state courts are given the first opportunity to pass on the merits of all claims. *See supra* at 12. To the extent the Court disagrees, and believes that the procedure endorsed in *Rose* precludes a stay of a petition that includes unexhausted as well as exhausted claims, then it is time to revisit that procedure. *See Pliler*, 124 S. Ct. at 2448 n.2 (Ginsburg, J., dissenting) (noting question as to whether *Rose*'s solution to mixed petitions "bears reexamination in light of [AEDPA's] one-year statute of limitations"); *Duncan*, 533 U.S. at 182-83 (Stevens, J., concurring) (questioning whether *Rose*'s "prescri[ption]" of dismissal for mixed petitions should govern in "post-AEDPA world"). When *Rose* approved a process by which mixed petitions were dismissed, it was as a means to end: by allowing a prisoner to exhaust fully and then return to federal court, it vindicated both comity principles and the interest in federal-court review of constitutional claims. *See Pliler*, 124 S. Ct. at 2450 (Beyer, J., dissenting). Adhering to that process when it no longer serves those ends elevates what is

purely form over substance – and in a way that has devastating consequences for the "longstanding constitutional interest in making habeas corpus available to state prisoners." *Id.*

B. AEDPA Does Not Preclude A Stay Of Federal Habeas Proceedings Pending Complete Exhaustion.

Though the Eighth Circuit seems to have relied exclusively on *Rose v. Lundy* for its position, *see Akins*, 341 F.3d at 686, respondent also suggests that a stay of proceedings would be inconsistent with AEDPA and its one-year limitations period. *See* Cert. Opp. at 10-11. But nothing in AEDPA or its statute of limitations precludes a district court from staying a timely filed habeas petition.

1. The two provisions of AEDPA at issue in this case are the one-year statute of limitations, 28 U.S.C. § 2244(d)(1), and the rule that a federal habeas provision "shall not be granted unless it appears that," *inter alia*, "the applicant has exhausted the remedies available in the courts of the State," *id.* at § 2254(b)(1). The stay procedures in wide use around the country are not at odds with either of those provisions. Stays may be issued only when, as in this case, an initial federal petition is filed within the one-year statute of limitations. And the issuance of a stay obviously does not constitute a pre-exhaustion "grant[]" of relief prohibited by § 2254(b)(1). Nothing in AEDPA by terms overrides a district court's inherent authority to issue a stay, and that should be the end of the matter. *See, e.g., Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) (where "statutory language provides a clear answer," inquiry into statutory construction is at an end).

2. With no textual support for its position, respondent falls back on the argument that stay procedures, because they extend consideration of petitions beyond the one-year limitations period, are inconsistent with the purpose (if not the language) of AEDPA's statute of limitations. But that argument fundamentally misconceives the relationship between a stay

of proceedings and a statute of limitations. On respondent's view, a stay of proceedings is necessarily inappropriate if it would avoid what otherwise would be a time bar. But on this Court's view, the opposite is true: a stay may be appropriate precisely *because* it would avoid what otherwise would be a statute-of-limitations problem. *See, e.g., Wilton v. Seven Falls Co.*, 515 U.S. 277, 288 (1995) (as between staying or dismissing an action in favor of parallel state proceedings, "a stay will often be the prefer[red] course, because it assures that the federal action can proceed without risk of a time bar"); *Deakins v. Monaghan*, 484 U.S. 193, 203 n.7 (1988) (approving stay because, "unless [the federal court] retained jurisdiction during the pendency of the state proceeding, a plaintiff could be barred permanently from asserting his claims in the federal forum by the running of the applicable statute of limitations"). Respondent's theory – that a statute of limitations is by itself somehow at odds with exercise of a district court's inherent authority to stay an action – cannot be reconciled with this established law.

Nor is respondent's proposed rule tailored to its objection on timeliness grounds. The decision below does not prohibit the issuance of a stay only after the AEDPA limitations period has run, or when a stay would extend consideration of a petition until after that date. It prohibits the issuance of a stay in *all* cases, whether or not a time-bar would thereby be avoided. Even if a district court wished to issue a short stay well before the limitations period had run – for instance, to avoid piecemeal consideration of claims when all will soon be exhausted – it could not do so. There are all kinds of routine case-management reasons for a district court to issue a stay of proceedings on a mixed habeas petition, as in other contexts. But under respondent's rule, no such stay could issue – regardless of whether the stay would have any effect at all on AEDPA's statute of limitations.

3. Respondent also argues that stays pending exhaustion are inconsistent with AEDPA's tolling provision, 28 U.S.C. §

2244(d)(2), as construed in *Duncan v. Walker*, 533 U.S. 167, 181-82 (2001). According to respondent, a stay pending exhaustion effectively "nullif[ies]" *Duncan*'s conclusion that the AEDPA statute of limitations is not tolled while federal, rather than state, post-conviction review is pending. Cert. Opp. at 11. In fact, a stay pending exhaustion does not have the same effect as tolling the limitations period during federal post-conviction proceedings: because a stay is discretionary, not automatic, it can be tailored or even withheld to avoid abusive litigation tactics, *see infra* at 19, and cannot be relied on by a prisoner in the same way as could a tolling provision that applied whenever a federal petition was pending. In any event, the majority in *Duncan* limited itself to a narrow question of statutory construction, and did not comment at all on the stay procedure endorsed by Justices Stevens and Souter in that case. *See* 533 U.S. at 181 (reserving question). *Duncan* in no way forecloses use of the stay procedures at issue in this case.

III. THE STAY PROCEDURES CHALLENGED BY RESPONDENT ARE SENSIBLE AND WORKABLE.

As shown above, rigid application of *Rose*'s "total exhaustion" procedure, combined with AEDPA's one-year statute of limitations, threatens the well-established principle that a prisoner who timely files a mixed petition may refile a perfected one after exhausting state remedies. As also demonstrated, there is no indication – textual or otherwise – that Congress actually intended that result. *See also Duncan*, 533 U.S. at 183 (Stevens, J., concurring) (referring to "reasonable belief that Congress could not have intended to bar federal habeas review for petitioners who invoke the court's jurisdiction within the 1-year interval prescribed by AEDPA"). Faced with that problem, the lower courts – with only the Eighth Circuit disagreeing – have crafted a sensible and workable solution that protects the continued vitality of cases

like *Rose*, *Martinez-Villareal*, and *Slack* without requiring district courts to overstep their authority.

1. As discussed above, *see supra* at 13-15, there is some variance in the particular procedures employed by courts around the country to stay proceedings on a mixed petition. But the basic contours of the rule are the same from circuit to circuit. A district court faced with a mixed petition has the authority to hold the federal proceedings in abeyance, either by staying the whole petition or by dismissing unexhausted claims and staying the remainder. Where the court dismisses unexhausted claims, it may permit the prisoner to reinstate those claims, once they are exhausted, by way of amendment under the "relation back" doctrine. *See Pliler*, 124 S. Ct. at 2445 (describing "stay and abeyance" procedure). The authority to stay, like the authority to permit amendment, is discretionary. But if AEDPA's limitations period is likely to bar the filing of a perfected petition after exhaustion, then denial of a stay generally will constitute an abuse of discretion. In other words, a stay will be "preferable" in many cases and will be "the only appropriate course . . . where an outright dismissal could jeopardize the timeliness of a collateral attack." *Zarvela*, 254 F.3d at 380 (internal quotation omitted); *see also Freeman*, 208 F.3d at 576 (Easterbrook, J.), *Nowaczyk*, 299 F.3d at 79; *Palmer*, 276 F.3d at 781; *Crews*, 360 F.3d at 152.

2. Respondent argues that stays pending exhaustion will encourage undue delay and abusive litigation. Cert. Opp. at 12. But non-capital petitioners – the vast majority of habeas petitioners – have no incentive whatsoever to engage in dilatory tactics. For non-capital prisoners, the point is to move as quickly as possible toward potential relief through federal-court adjudication of a fully exhausted petition. *See Rose*, 455 U.S. at 520 (prisoner's "principal interest, of course, is in obtaining speedy federal relief on his claims"); *Duncan*, 533 U.S. at 191 (Breyer, J., dissenting).

In any event, and even with respect to capital petitioners like Rhines, there are ample means of preventing dilatory litigation of the sort the State hypothesizes. First, AEDPA itself checks abusive litigation practices by permitting district courts to dismiss even mixed petitions on the merits if they raise insubstantial claims. 28 U.S.C. § 2254(b)(2); *see Duncan*, 533 U.S. at 182-83 (Stevens, J., concurring). And concerns that prisoners will prolong federal stays by "running out the clock" with repeated state filings, *see* Cert. Opp. at 12, are largely addressed by the states' own procedural rules. *See Slack*, 529 U.S. at 489 (states "remain free to impose proper procedural bars to restrict repeated returns to state court for post-conviction proceedings").

Perhaps most important, discretionary stay procedures give district courts the flexibility they need to prevent dilatory or repetitive litigation. Though granting a stay ordinarily will be appropriate when a post-exhaustion filing otherwise would be time-barred, district courts may deny a stay or permission to amend when a prisoner has not exercised reasonable diligence. *See Zarvela*, 254 F.3d at 380-81. They may also, in their discretion, condition or limit their stays and the amendments they will allow. If a prisoner may be contemplating the filing of multiple mixed petitions, then a district court can grant a stay but order that the prisoner present only fully exhausted claims in his next federal pleading, on pain of dismissal with prejudice. *See Slack*, 529 U.S. 490. If a court is worried that a prisoner will unduly delay in pursuing state remedies, then it can put time limits on its stay. Following the lead of the Second Circuit, for instance, the district court below conditioned its stay on petitioner's initiation of state-court exhaustion proceedings within 60 days of its order, and a return to federal court within 60 days after exhaustion is completed. *Supra* at 4; *see Zavala*, 254 F.3d at 2[illegible]1 (stays ordinarily conditioned on speedy commencement of exhaustion and return to federal court); *see Palmer*, 276 F.3d at 781 (approving Second Circuit approach). This list is

not exhaustive. The point is that stay procedures, rooted in the equitable discretion of district courts, allow for a case-specific approach that precludes abusive tactics without foreclosing federal review for diligent and good-faith litigants.

3. The stay procedures adopted by lower courts respond to a real problem. If for some reason they were unavailable, then other responses would take their place. And the most likely alternatives would raise serious concerns that the stay procedures do not.

If district courts cannot stay proceedings on mixed petitions, then prisoners may be advised by counsel, or on their own decide, to "take precautionary measures to guard against . . .being penalized [if] the district court judge takes a long time to rule upon the exhaustion status of the petition." R. Hertz & J. Liebman, 1 *Federal Habeas Practice and Procedure* § 5b, at 274 (4th ed. 2001). One such precaution might be to capitalize on AEDPA's tolling provision by filing unnecessary or redundant state-court petitions in order to "stop the clock" while a federal district court considers exhaustion. That route, which would require state courts to adjudicate frivolous or already-exhausted claims, would undermine the comity principles identified by *Rose* in a way that stay procedures do not. Less troubling on comity grounds, but still wildly inefficient, would be an alternative that shifts the burden to the district courts: prisoners could ask those courts for emergency rulings on exhaustion, and seek equitable tolling if such rulings were not forthcoming. *Id.* Even assuming that district courts could and would act quickly on such requests, the procedure, as its proponents acknowledge, would be "cumbersome and time-consuming," at the expense of the federal courts. *Id.*

It is for good reason that the stay procedure at issue has been adopted by virtually every court to consider the question. That stay procedure is flexible enough to protect the right of good-faith litigants to federal-court review while at

the same time preventing abusive litigation tactics, and is far superior to alternative solutions to the same problem.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted,

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